(1)

88-108

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD
dba NORTH COUNTY TRANSIT DISTRICT,
VONSHILLIA ADAMS,
Petitioners,

v.

MARY LOU HAYNES and LORI C. HAYNES,
STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

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QUESTION PRESENTED

Under the Fourth Amendment, must a public transit employer which requires its employees to submit to mandatory drug and alcohol testing following bus accidents, on less than probable cause, maintain the confidentiality of the test results as to outside third parties?

PARTIES TO THE PROCEEDINGS

The Petitioners are the NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD, dba NORTH COUNTY TRANSIT DISTRICT ("NCTD"), a public transit agency existing under California law (California Public Utilities Code § 125000, et seq.), and VONSHILLIA ADAMS, an employee-driver for NCTD who consented to a confidential drug test following a fatality accident. The Respondents are MARY LOU HAYNES and LORI C. HAYNES, surviving family members of the fatality victim who seek discovery of the test results. The STATE OF CALIFORNIA, DEPARTMENT OF TRANSPORTATION, is also a Respondent as a cross-party in the underlying civil action.

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MARY LOU HAYNES and LORI C. HAYNES,
STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL

The NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD (herein "NCTD"), petitions for a Writ of Certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One, and the decision of the California Supreme Court refusing to review the California Court of Appeal's opinion.

OPINIONS BELOW

The California Superior Court, San Diego County, North County Branch, granted Petitioners' Motion to Quash Respondent's Subpena seeking to compel disclosure of NCTD's confidential drug test results taken of Pe-

titioner ADAMS, with her consent, following a fatality bus/pedestrian accident. The Trial Court ruling is an unpublished opinion. (App., *infra*, 1a-3a). The California Court of Appeal, Fourth Appellate District, Division One, overturned the Trial Court Order and compelled NCTD to disclose the confidential drug test results to Respondents in an unpublished opinion. (App., *infra*, 5a-10a). The California Supreme Court denied review (App., *infra*, 11a) and the Remittitur making the Court of Appeal ruling final was filed on June 6, 1988. (App., *infra*, 12a-13a).

JURISDICTION

The opinion of the California Court of Appeal was filed on February 24, 1988. The California Supreme Court's Order denying review was entered on May 19, 1988, and the Remittitur making the Court of Appeal opinion final was entered on June 6, 1988. A Petition for a Writ of Certiorari is due on August 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Pertinent excerpts from the NCTD Drug and Alcohol Abuse Program Testing Regulations involved in this case are reproduced in the Appendix to the Petition (App., *infra*, 14a-17a).

STATEMENT OF THE CASE

I. The Constitutional Issue Presented in Context.

A. *NCTD's Drug and Alcohol Abuse Program.*

NCTD operates an active fleet of one hundred twenty (120) buses and carries approximately eight million (8,000,000) public passengers per year. Its safety record is exemplary.[1] NCTD's innovative drug testing program is an important factor in maintaining its exemplary safety record.

NCTD's drug testing program is an integrated one comprised of the following components: (1) Confidential treatment and counseling, at NCTD expense, for employees with drug or alcohol problems, (2) A voluntary testing program which encourages drug free behavior by giving awards and prizes to employees who volunteer to submit to periodic random testing and who pass all such tests (approximately 47% of NCTD's employees participate in the voluntary program), and (3) Mandatory urinalysis under certain specified circumstances, including following an accident involving a fatality. These components of the program are described in more detail below.

When NCTD first determined to adopt its comprehensive Drug and Alcohol Abuse policy it offered complete amnesty to all employees who would voluntarily come forward and seek treatment or counseling for existing drug or alcohol problems. Since that time, NCTD has continuously maintained a confidential "Employee Assistance Program" whereby any employee may seek outside counseling and treatment for drug or alcohol re-

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[1] To the extent relevant to these proceedings, the facts recited in this Petition were uncontroverted in the State Court proceedings. Respondents HAYNES argued in the State Court proceedings that their discovery rights as civil plaintiffs entitled them to discover NCTD's confidential drug test results. They did not contest the facts regarding NCTD's testing program or operations.

lated problems. This program is funded by NCTD but even NCTD does not have access to the outside counseling organization's records nor to the names of employees who request assistance.

The "voluntary" testing component of NCTD's overall program has been in successful operation for several years. Employees who volunteer to submit to unannounced random drug testing, and who pass the random tests, are eligible for prizes and awards including government savings bonds and expense paid vacations. Approximately forty-seven percent (47%) of NCTD's employees voluntarily participate in this program.

The third component of the overall program is mandatory urinalysis under certain circumstances, including following accidents. These tests do not require probable cause or "particularized suspicion". They require only that an accident occur. Although there is undoubtedly some inference that can be drawn following a bus accident that the bus driver *might* have been drug or alcohol impaired and that such impairment contributed to the accident, the inference is not always strong since it does not take into account other equally prevalent and non-drug or alcohol factors causing accidents. NCTD's testing program is not truly "random" in that only drivers involved in accidents are tested, but it is equally clear that Fourth Amendment probable cause is not present. NCTD's mandatory tests fall somewhere between true random selection and full probable cause.

B. *The Underlying Accident.*

Respondents HAYNES are surviving family members of decedent HAYNES who was killed when struck by an NCTD bus driven by Petitioner ADAMS. The accident occurred on July 7, 1986 while the HAYNESES were attempting to cross the street in a crosswalk. NCTD and the HAYNESES do not agree on what caused the accident. The HAYNESES contends that the NCTD

bus ran a red light. NCTD contends that the bus lawfully entered the intersection with the light and the HAYNESES stepped off the curb without looking.

Petitioner ADAMS was tested pursuant to NCTD's Drug and Alcohol Abuse Policy immediately following the accident. Respondents HAYNES attempted to subpena ADAMS' test results directly from the hospital which had taken the test. Petitioners challenged the subpena and the California Court proceedings followed.

C. *The California Court Proceedings.*

NCTD brought a Motion to Quash the HAYNES' subpena seeking the ADAMS' drug test results. The Trial Court found compelling the position asserted by ADAMS and NCTD that a civil plaintiffs' discovery rights must yield to a higher constitutional standard that recognizes privacy as an "inalienable right". The Trial Court also found compelling the overriding public policy considerations in favor of maintaining the confidentiality of drug test results as an important means to promote the overall safety of the public. (App., *infra*, 2a). The Trial Court rejected Respondents' position that their rights to civil discovery were paramount to the aforementioned interests.

Following the Trial Court ruling, Respondents petitioned the California Court of Appeal, Fourth Appellate District, Division One, for a Writ of Mandate to overturn the Trial Court decision. On February 24, 1988, the Court of Appeal issued a Peremptory Writ of Mandate in an unpublished opinion (App., *infra*, 5a-10a). The Appellate Court ordered the Trial Court to enter a new Order denying NCTD's Motion to Quash, thereby compelling disclosure of the test results. *Id.* at page 9a.

In making its ruling, the Court of Appeal did not reach the constitutional issues raised herein and considered in the Trial Court, but based its decision exclusively upon California statutory law and concluded that since NCTD's

tests were "involuntary", compelled disclosure of the results to third parties would not jeopardize the ongoing program. (App., *infra*, 9a).

Petitioners NCTD and ADAMS sought rehearing in the Court of Appeal. The Petition for Rehearing was deemed denied when the Court of Appeal failed to respond. On May 19, 1988, the California Supreme Court denied Petitioners' request for review of the case. (App., *infra*, 11a). On June 6, 1988, the Court of Appeal issued its Remittitur making its decision final. (App., *infra*, 12a).

D. *The Constitutional Issue.*

Contrary to the cases of *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988) and *Burnley v. Railway Labor Executives Ass'n*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, No. 87-1555 (June 6, 1988) in this case the employer (NCTD) and the employee (ADAMS) have both accepted the validity of NCTD's drug testing program. In contrast to the *Burnley* and *Von Raab* cases NCTD is *not* in a dispute with its employee union or with ADAMS over whether NCTD's drug testing is constitutional. Rather, NCTD and its employee assert a common position against forced third party disclosure of results. NCTD and ADAMS both assert that NCTD's testing program is constitutional under the Fourth Amendment only if confidentiality of the results is maintained.

Although the specter of NCTD's inability to avoid violation of ADAMS' Fourth Amendment rights was clearly raised below unless confidentiality of the test results was maintained (App., *infra*, 22a-23a), the California Court of Appeal did not address the constitutional issue. If NCTD cannot protect the promised confidentiality of test results, then NCTD, as a governmental entity, will become a conduit in making drug test results obtained without probable cause available to law enforce-

ment and other outside third parties who could not otherwise obtain such test results. The California Court of Appeal ruling compels NCTD to violate the Fourth Amendment rights of its employees by disclosing its confidential test results.

The severe consequences of such a Fourth Amendment violation are not idle speculation, as demonstrated by the facts of this case. Once confidentiality of the ADAMS' test results is breached, the results are in the "public domain" and are available to law enforcement agencies, the media, and others. Law enforcement agencies could, if the test results are positive, prosecute ADAMS under California law for vehicular manslaughter and other drug related criminal violations. *See*, Cal. Penal Code §§ 191.5, 192 [vehicular manslaughter while intoxicated] and Cal. Veh. Code §§ 23152, 23153 [alcohol and drug offenses].

The compelled third party disclosure required by the California Courts can lead to the anomalous and unconstitutional result that drug test results obtained without probable cause can form the basis of a criminal prosecution solely because a public employer, for its own internal, non-law enforcement purposes, took the tests on less than probable cause. This leaves the employer with the choice of either abandoning its testing program entirely to avoid disclosure of confidential test results, or violating its employees' constitutional rights by making disclosure. This dilemma, however, is resolved by guaranteeing confidentiality of the test results under the Fourth Amendment.

The *Burnley* and *Von Raab* cases squarely present this Court with perhaps the most fundamental drug testing constitutional issue: What standard must be met in order to require a public employee to submit to a test in the first instance? The instant case raises an equally important constitutional issue not dealt with in either *Burnley* or *Von Raab*: Given that a test is properly re-

quired in the first instance, under the Fourth Amendment, what restrictions must apply to dissemination of the results?

E. *Jurisdiction.*

Petitioners NCTD and ADAMS have properly invoked the jurisdiction of this Court to grant certiorari. Petitioners have properly raised the Fourth Amendment issue in the proceedings below (App., *infra*, 22a-23a) and have exhausted all state avenues of appeal by petitioning the State Supreme Court for hearing. When the California Supreme Court denied review, the Fourth District Court of Appeal decision became reviewable under 28 U.S.C. 1257(3).[2]

REASONS FOR GRANTING THE PETITION

This Court already has before it the key constitutional issue of what standard must be met before a public employer may require a public employee to take a drug test. Collecting a drug test sample is only half of the equation, however. The other half regards what can be done with the results once collected. The *Burnley* and *Von Raab* cases will answer the first question. This Court should grant hearing in the instant case to answer the equally important second question and to insure that this Court's holding in *Von Raab* and *Burnley* is complete. Certainly, if a constitutional standard for taking a test on something less than full probable cause is to be sanctioned in the *Burnley* and *Von Raab* holdings, then con-

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[2] Although the California Court of Appeal ruling is not a "final judgment" in the underlying civil accident case, it is a final judgment on the constitutional issue raised in this proceeding. If Respondents are permitted to subpena ADAMS' drug test results, her Fourth Amendment rights are lost. Equally importantly, if NCTD cannot insure the confidentiality of its drug test results its entire drug testing program is jeopardized and may have to be abandoned. If employers cannot guarantee the confidentiality of drug tests, then all drug testing programs are jeopardized. These issues are ripe at this time.

fidentiality of the results after collection must be considered in determining the overall "reasonableness" of the testing program under the Fourth Amendment.

In addition to the foregoing, there are at least two important reasons why this Court should grant review. First, there is significant conflict in the circuits on the sensitive issue of public employer/employee drug testing programs. Indeed, this Court recently granted review in two such cases, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988), and *Burnley v. Railway Labor Executives Ass'n*, 839 F.2d 575 (9th Cir. 1988), *cert. granted*, No. 87-1555 (June 6, 1988). The briefs filed in these cases, which have been reviewed by Petitioners herein, fully present the existing federal and state authorities on public employer/employee drug and alcohol testing and document the conflict in the circuits. Said briefs are referred to and incorporated herein by this reference in the interest of brevity.

Second, the California Court of Appeal's decision is wrong. The controlling U.S. Supreme Court cases make it clear that under the Fourth Amendment the individual employee's reasonable expectation of privacy must be assessed, weighed, and balanced as must the legitimate interests of the employer in promoting a safe workplace and carrying out its governmental function. In addition, the general public interest in promoting safe public transit must be weighed and balanced in determining what is "reasonable" under the Fourth Amendment.

The California Court of Appeal erroneously refused to conduct a Fourth Amendment balancing inquiry, mistakenly concluding that no overriding public interest was involved, and mistakenly concluding that California statutes dispense with the balancing requirement. These reasons are discussed in more detail below.

I. The Decision of the California Courts Compelling Third Party Disclosure of Confidential Drug Test Results Raises an Important Fourth Amendment Issue of Great National Importance on Which the Circuits Widely Differ.

There is conflict in the federal circuits in the area of public employee drug testing. Under the Fourth Amendment, a "search" occurs, giving rise to the Fourth Amendment's protection, when the government interferes with an expectation of privacy that society is prepared to consider "reasonable". *United States v. Jacobson*, 466 U.S. 109, 113 (1984). The cases are reasonably uniform that requiring a public employee to produce a urine sample for chemical analysis constitutes a "search" within the meaning of the Fourth Amendment since it violates the employee's reasonable expectation of privacy.[3] The issue then becomes whether, under all the

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[3] *See, e.g., Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988), *cert. granted*, No. 87-1555 (June 6, 1988); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *cert. granted*, No. 86-1879 (Feb. 29, 1988); *Everett v. Napper*, 833 F.2d 1507, 1551 (11th Cir. 1987); *Jones v. McKenzie*, 833 F.2d 335, 330 (D.C. Cir. 1987), *petition for cert. filed*, No. 87-1706 (Apr. 15, 1988); *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987); *McDonell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Policemen's Benevolent Ass'n v. Washington Township*, 672 F. Supp. 779, 784 (D.N.J. 1987); *Taylor v. O'Grady*, 669 F. Supp. 1422, 1434-1435 (N.D. Ill. 1987); *Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency*, 663 F. Supp. 1560, 1566 (C.D. Cal. 1987); *Feliciano v. City of Cleveland*, 661 F. Supp. 578, 586 (N.D. Ohio 1987); *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510, 844 F.2d 562 (8th Cir. 1988); *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 732-733 (S.D. Ga. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879, No. 50742 (6th Cir. 1988) (WESTLAW, Allfeds library); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986); *Patchoque-Medford Congress of Teachers v. Board of Education*, 517 N.Y.S.2d 456, 460-461 (1987); *City of Palm Bay v. Bauman*, 475 So. 2d 1322, 1324 (D.C. App. Fla. 1985); *Caruso v. Ward*, 506 N.Y.S.2d 789, 792 (1986).

circumstances and taking into the balance the compelling interest, the testing program is "reasonable" within the meaning of the Fourth Amendment.

The circuit courts are in great disagreement on this issue as reflected in the briefs in the *Burnley* and *Von Raab* cases pending hearing in this Court. In fact, *Burnley* and *Von Raab* are themselves in conflict.

In *Burnley*, the employers seek review of the Ninth Circuit's disapproval of the Federal Railroad Administration's drug testing program. The Ninth Circuit disapproved the program requiring testing following major accidents on the grounds that the Fourth Amendment required "particularized suspicion" which was absent in the program. *Burnley*, 839 F.2d at 575. In contrast, in *Von Raab* it is the employees who seek review of the Fifth Circuit's approval of the U.S. Customs Service drug testing program which the Fifth Circuit found to be "reasonable" under the Fourth Amendment even though there was no "particularized suspicion". *Von Raab*, 816 F.2d at 170.

The conflict in the circuits as to how to interpret Fourth Amendment "reasonableness" in the context of public employer/employee drug testing has made it nearly impossible for public employees such as NCTD to implement effective drug and alcohol prevention programs without serious risk of violating the Constitution. *See*, Comments: *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can be a Legitimate Tool for Helping Resolve the Nation's Drug Problem if Competing Interests of Employer and Employee are Equitably Balanced*, 25 Duq. L. Rev. 597 (1987).

In addition to the competing interests of the public employer and employee, and the general public's interest in safety raised in *Burnley* and *Von Raab*, the instant case raises another interest: that of a third party to have access to the drug test results for purposes of civil litigation.

In order to fashion a constitutionally sound rule and to bring uniformity to the existing conflict in the circuits *all* of the legitimate interests at stake must be considered in determining what is "reasonable" under the Fourth Amendment. These include the rights of a public employer and its employees to insure confidentiality of test results, on the one hand, and the interests of third parties to have access to the test results, on the other.

The Court in *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986), recognized the importance of preserving the confidentiality of test results once collected, but confidentiality in that case was expressly required by the applicable regulations with respect to urine tests, and with respect to breathalyzer tests, proposed regulations would have guaranteed confidentiality ["pursuant to the express provisions of the regulations, the results are kept confidential even from the enforcement agencies. N.J. Admin. Code tit. 13, § 70-14A.11(e)"]. *Shoemaker*, 795 F.2d at 1140. Thus, the court in *Shoemaker* was not required to reach the Fourth Amendment issue raised in this case.

Although the court in *Shoemaker* held that a random testing procedure was proper in the highly regulated horse-racing industry where confidentality was guaranteed by statute, it expressly left for the future the issue of whether or not the Fourth Amendment compelled confidentiality. In its holding the Court stated:

> We find no abuse of discretion [in the district court's denial of declaratory relief or injunctive relief]. If the commission ceases to comply with the proposed confidentiality rules, the jockeys may return to court with a new lawsuit. Their privacy contentions, in the circumstances of this case, are not ripe for adjudication. *Id.* at 1144.

The constitutional issue which was not "ripe" in *Shoemaker* is squarely raised in the instant case. NCTD submits that its Drug and Alcohol Abuse Program, and public employee drug testing in general, on less than Fourth Amendment probable cause are "constitutionally reasonable" *only* if the results are confidential. NCTD respectfully submits that this Court should announce the rule to be as follows:

> A public employer may drug test its public employees on less than probable cause [based on a standard to be established in the *Burnley* and *Von Raab* cases] and must maintain the confidentiality of those results. Third parties other than the employer and the employee may not obtain those results except upon a showing of Fourth Amendment probable cause.

Such a rule would permit the important public purposes served by public employee drug testing to be achieved while respecting the constitutionally guaranteed Fourth Amendment and privacy rights of the employees and promoting the legitimate public interest in transit safety. In a particular situation where law enforcement or private third parties could make a showing, based upon independent evidence, that probable cause existed to suspect drug or alcohol abuse, they would be permitted to subpena and obtain the test results.

Such a rule is reasonable and avoids the dangerous constitutional violations which otherwise can result as exemplified by the facts of this case: A viable Drug and Alcohol Abuse Program based upon confidentiality is in effect. An accident occurs. Because the circumstances of the accident do not give rise to "probable cause" to suspect drug or alcohol abuse, law enforcement and third parties are unable to obtain a drug or alcohol test on the public employee. However, the employer obtains such a test, confidentially, for its own internal purposes pursuant to its Policy. Under the existing California Court

ruling, this employer is then required to breach confidentiality and place those results in the public domain. The loop is completed when law enforcement authorities obtain the drug test results from the public domain and use them in a criminal prosecution. The end result is that law enforcement is able to prosecute a criminal action against the employee/driver based upon drug test results indirectly obtained which they could not have constitutionally obtained directly.

By failing to undertake a balancing of interests under the Fourth Amendment, the California Courts issued a ruling which results in violation of the Fourth Amendment and probably sounds the death knell for any type of cooperative drug testing in the public workplace. It is simply not reasonable to expect public employees to submit to drug testing when they know the results will be subject to compulsory disclosure.

An employee who subjects him or herself to a confidential test, at worst, faces some form of internal disciplinary procedure possibly culminating in termination for drug or alcohol use. In NCTD's situation, as in most public employer situations, that employee is guaranteed a number of rights, including confidential pre-termination hearings, the confidential right to be heard and to present evidence before any discipline is imposed, etc. In contrast, an employee who submits to a drug test where confidentiality is not guaranteed, exposes him or herself, in addition to discipline, to all of the following risks:

1. The risk of public obloquy and peer disapproval if it is made public that the employee is accused of drug or alcohol abuse (this can be particularly important when it is recognized that there is a certain frequency of "false positives" in test results).

2. The employee is exposed to personal civil liability. This case is a good example where the employee/driver, in addition to NCTD, is being sued. If the drug test results are released, and if they

should be positive, the employee may be exposed to an award of punitive damages or may be found to have been acting outside the course and scope of her employment since it was not part of her job duties to operate a vehicle with drugs or alcohol in her system.

3. The employee is exposed to criminal liability.

It is simply unrealistic to expect any drug testing program in the public workplace to work in the absence of confidentiality of results. Preservation of confidentiality of test results serves the interests of the employee, the employer, and the public. The legitimate interests of outside third parties are not impaired by the rule proposed in that, upon a showing of probable cause, the test results can be obtained.

The important public interest in promoting drug control programs such as NCTD's is recognized in federal policy. Exec. Order No. 12,564, 51 Fed. Reg. 32889 (1986), was recently issued by President Reagan, authorizing federal agencies to establish drug testing programs in order to combat America's mounting substance abuse problem. *See*, President's Commission on Organized Crime, *Report to the President and the Attorney General, America's Habit: Drug Abuse, Drug Trafficking, and Organized Crime* (1986) at 484-485.

The two express purposes of Exec. Order No. 12,564 are to achieve a drug-free federal workplace and also to protect the privacy of federal employees. 51 Fed. Reg. 32889. Section 2(4) of the order provides for "maximum respect for individual confidentiality consistent with safety and security issues." *Id.* Although NCTD is not a federal agency, it does receive the bulk of its funds from the Federal Urban Mass Transit Administration and its existing Drug and Alcohol Abuse Policy is consistent with Exec. Order No. 12,564.

II. The California Appellate Court's Decision Conflicts with This Court's Decision on Personal Privacy.

The California Court of Appeal's decision is wrong. It abridges ADAMS' fundamental right to privacy guaranteed by the Constitution by compelling disclosure of her private drug test results. This Court recently addressed the issue of a government employee's right to privacy in *O'Connor v. Ortega*, No. 85-530, 107 S. Ct. 1492 (1987).

Although the employee privacy rights recognized in the *O'Connor* opinion have yet to be carried over to a drug testing case, the time is ripe to harmonize this Court's important privacy holding in *O'Connor* with whatever public employer/employee drug testing rule the Court announces in *Burnley* and *Von Raab*. The instant case squarely raises these privacy issues and provides the vehicle for such a ruling while the *Burnley* and *Von Raab* cases do not.

Certainly, if the doctor in *O'Connor* had a reasonable expectation of privacy in his desk and file cabinets, a public employee must have a reasonable expectation of privacy in his or her body fluids *and* in what will be done with the results of testing. *See, Schmerber v. California*, 384 U.S. 757, 767 (1966) [bodily fluids' testing constitutes a search and seizure within the Fourth Amendment]; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) [medical records are of such an intimate nature as to warrant unique privacy concerns]; *Shoemaker v. Handel*, 795 F.2d 1136 (1986) [statutory guarantee of confidentiality of drug test results taken from jockeys important to validity of random testing program].

Under these authorities and this Court's recent opinion in the *O'Connor* case, the public employee has a reasonable expectation of privacy in drug test results given to the employer on less than problabe cause. The em-

ployee has a reasonable expectation that the use of such drug test results will be narrowly limited to the employer's legitimate purposes, and will not be disclosed to third parties. As this Court stated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), in describing the proper application of the Fourth Amendment balancing test:

> Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable:
>
> > Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception," *Terry v. Ohio*, 392 U.S. 1 (1968); second, one must determine whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place, *ibid.* *Id.* at 341.

NCTD respectfully submits that public employer drug testing of public employees on less than probable cause is reasonable, at least as to transit operators because of the public safety issues involved [*Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir. 1976), *cert. denied*, 429 U.S. 1029 (1976), *provided* that the test results are confidential. Just as there are reasonable prerequisites to testing, there must be reasonable restrictions on the use of the results.

CONCLUSION

The California Court decision in this case has effectively nullified a carefully considered and effective program to control drugs and alcohol at NCTD. Ironically, NCTD's program is supported by both the employer and the employees but is jeopardized because the California Courts have required compulsory disclosure of test results without considering and balancing the constitutional

rights of the tested employee, the employer, and the general public against the need for third party disclosure.

It is respectfully submitted that a grant of plenary review in this case, in conjunction with *Burnley* and *Von Raab*, would provide this Court with the opportunity to make a meaningful and comprehensive ruling on the public employment drug testing issue and to provide much needed guidance to the lower courts and government agencies on an important issue of the times.

If the Petition is granted, the Court may wish to direct that this case be set for argument in tandem with *Burnley* and *Von Raab* which have already been set in tandem for oral argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

Case No. N35897

MARY LOU HAYNES and LORI C. HAYNES,
Plaintiffs,

vs.

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD dba NORTH COUNTY TRANSIT DISTRICT, THE STATE OF CALIFORNIA, VONSHEILLIA ADAMS, and DOES 1 through 20, inclusive.

Defendants.

[Filed Aug. 18, 1987]

ORDER GRANTING MOTION TO
QUASH SUBPENA DUCES TECUM

This matter came on regularly for hearing on June 19, 1987 at 9:00 a.m. before the above-referenced Court, the Honorable David B. Moon, Jr., Judge presiding. Plaintiffs were represented by John W. Tower of the Law Offices of Lawrence E. Eden. Defendant STATE OF CALIFORNIA was represented by Sherman Hollingsworth of the Department of Transportation, Legal Department. Defendants NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT ("NCTD") and VONSHEILLIA ADAMS were represented by Tracy R. Richmond of the Law Offices of D. Dwight Worden.

The Court heard oral argument and considered all of the pleadings submitted by the parties in support of their respective positions. Good cause appearing, therefore, the Court ruled as follows:

The Motion to Quash Subpena Duces Tecum brought by Defendants NCTD and VONSHEILLIA ADAMS is hereby granted. The Court finds that there are competing policies which must be balanced in reaching its determination. It finds that the promise of confidentiality and privacy of test results is critical to insuring compliance with the alcohol and drug program of Defendant NCTD. Further, the Court finds that the public policy of promoting public safety is furthered by such a program. Therefore, these interests outweigh the Plaintiffs' right to discovery such that they have not made a proper showing of good cause to justify disclosure of such records.

Dated: Aug. 18, 1987

/s/ David B. Moon, Jr.
DAVID B. MOON, JR.
Judge of the Superior Court

Approved as to Form and Content:

Dated:

LAW OFFICES OF
LAWRENCE E. EDEN

By: John W. Tower
Attorney for Plaintiffs

Dated: June 24, 1987

LAW OFFICES OF
D. DWIGHT WORDEN
A Professional Corporation

By: /s/ Tracy R. Richmond
TRACY R. RICHMOND
Attorney for Defendants
NORTH SAN DIEGO COUNTY
TRANSIT DEVELOPMENT
BOARD and
VONSHEILLIA ADAMS

Dated: July 16, 1987

MEYER, HOLLINGSWORTH,
PETERSON & JOSEPH

By: /s/ Sherman E. Hollingsworth
SHERMAN E. HOLLINGSWORTH
Attorney for Defendant
STATE OF CALIFORNIA

APPENDIX B

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D006831

(Super. Ct. No. N35897)

MARY LOU HAYNES *et al.*,
Petitioner,

v.

SUPERIOR COURT, ETC., COUNTY OF SAN DIEGO,
Respondent.

NORTH SAN DIEGO COUNTY TRANSIT
DEVELOPMENT BOARD *et al.*,
Real Parties in Interest.

[Filed Sept. 29, 1987]

THE COURT:

Let an alternative writ of mandate issue, directing the respondent to show cause before the court why the relief prayed for should not be granted. Real parties in interest will have until October 13, 1987, to file a written response and petitioner shall have until October 27, 1987, to reply. Oral argument will be calendared.

/s/ Benke
BENKE, Acting P.J.

Copies to: All Parties

APPENDIX C

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D006831

(Super. Ct. No. N35897)

MARY LOU HAYNES *et al.*,
Petitioner,

v.

SUPERIOR COURT, ETC., COUNTY OF SAN DIEGO,
NORTH COUNTY JUDICIAL DISTRICT,
Respondent.

NORTH SAN DIEGO COUNTY TRANSIT
DEVELOPMENT BOARD *et al.*,
Real Parties in Interest.

Petition for writ of mandate after quashing of subpoena duces tecum. David B. Moon, Jr., Judge. Granted.

On July 7, 1986, Vonsheillia Adams, an employee of the North San Diego County Transit Development Board (Transit) was driving a Transit bus on her assigned route. Carl and Mary Haynes were at the intersection of Mission Avenue and Barnes in Oceanside when the walk sign came on. As the Hayneses walked into the intersection, they were struck by the bus. Carl was killed and Mary was injured. Mary filed suit against Transit for wrongful death and personal injury.

Transit requires the drivers of any bus involved in a fatal accident provide a specimen for a drug test. After this accident, Adams was transported to Tri-City Medical Center by a Transit supervisor where she was given a drug test. Haynes, who seeks to obtain the results of this test, served a subpoena duces tecum with affidavit, a motion to consumer, a notice of deposition and a certificate of compliance with notice requirements. The affidavit in support of the subpoena requests the following records:

> "All medical records for VONSHEILLIA ADAMS for the period from January 1, 1986, to the present, including, but not limited to, any blood or urine tests conducted on or about July 7, 1986."

It lists the following reason for production:

> "VONSHEILLIA ADAMS was driving an NCTD bus that struck and killed Carl Haynes and injured Mary Lou Haynes. The requested records will show the medical, physiological and psychological condition of VONSHEILLIA ADAMS at the time of the accident and will therefore show her ability to perceive, react, and operate the bus."

Transit moved to quash the subpoena on the basis the disclosure of Adams's records would violate the privacy rights of both employer and employee, would breach their relationship of confidentiality concerning such matters and would impair the integrity of Transit's drug and alcohol program. The trial court granted the motion to quash. Haynes sought review in this court and after granting an alternative writ, we now issue the peremptory writ.

DISCUSSION

A. *Adams's Right to Privacy*

Article I, section 1 of the California Constitution accords Adams's privacy the constitutional status of an inalienable right. (*Vinson* v. *Superior Court* (1987) 43

Cal.3d 83, 841.) However, "[o]n occasion her privacy interests may have to give way to her opponent's right to a fair trial. Thus courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery." (*Id.* at p. 842.) Indeed the "state is said to have a compelling interest in 'facilitating the ascertainment of truth in connection with legal proceedings.' [Citation.]" (*Morales* v. *Superior Court* (1979) 99 Cal.App.3d 283, 290.)

Although the Legislature cannot derogate the protection provided by our Constitution, in discharging its duties it may obviate the need for any further balancing of competing interests by the judicial branch. (*Vinson* v. *Superior Court*, *supra*, 43 Cal.3d at p. 843.) For instance in sexual harassment and sexual assault cases, Code of Civil Procedure section 2017, subdivision (d), prevents discovery concerning the plaintiff's sexual relations with anyone other than the alleged perpetrator unless the discovery is supported by specific facts showing good cause, the information sought is relevant to the subject matter of the lawsuit and the request is reasonably calculated to lead to the discovery of admissible evidence. As interpreted by the Supreme Court in *Vinson*, the balancing of interests set forth in section 2017 adequately protects a plaintiff's right of privacy. (*Id.* at pp. 843-844.)

In this case Haynes's right to a fair trial and Adams's right to privacy have been the subject of the same sort of legislative balancing discused in *Vinson*. Like Code of Civil Procedure section 2017 subdivision (d), Evidence Code section 999 [1] carefully constrains a litigant's access to otherwise private information.

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[1] Evidence Code section 999 provides: "There is no privilege under this article as to a communication relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown."

Evidence Code section 999 limits access to cases where the conduct of the patient is in issue and the information sought is relevant to resolution of that dispute. Access is also limited by the requirement that the party seeking information demonstrate "good cause" for its disclosure. In the context of medical information, the "good cause" requirement was intended to prevent a "fishing expedition" into a patient's medical records and history. (Assembly Committee on Judiciary Comment, 1975 Amendment.) Thus Evidence Code section 999 requires a relatively narrow specification of the information sought.

Given the interests a court must weigh before ordering disclosure of drug and narcotic information, and the limited scope of any disclosure, we believe that, as in *Vinson*, the legislative scheme fully protects Adams's privacy interests.

B. *Adams's Statutory Rights*

The results of the test Adams took immediately following the collision meet the disclosure requirements of Evidence Code section 999. The results will plainly assist the trier of fact in determining Adams's physical condition at the time of the accident; Adams's physical condition, in turn, is plainly relevant to any determination of her culpability. The request for the post-accident test results is narrow and the information requested is not available from any other source. Although not argued in papers before this court, the subpoena here is, however, overbroad in requesting all medical documents from January 1, 1986. The only evidentiary request which meets the relevancy and good cause requirements of Evidence Code section 999 is for the result of that test conducted the day of the accident.

In this case Transit's alcohol and drug policy does not offer any treatment for employees suffering from drug or alcohol abuse. Thus neither Transit nor Adams can argue that disclosure will injure Adams by interfering

with treatment she is receiving or any physician-patient relationship. Adams and Transit do argue, and the trial court found, that Transit's promise of confidentiality is critical to insuring compliance with its alcohol and drug program.

The testing program described in Transit's written drug and alcohol program is in no sense voluntary. It provides that, "[r]efusal to submit immediately to a chemical test or search or to answer questions when requested by District or law enforcement personnel shall be grounds for insubordination and gross negligence and conduct unbecoming an employee, and will lead to termination." The policy further provides that employees "must . . . [s]ubmit immediately to a chemical test and/or search when requested and answer questions." Moreover, "[i]f a chemical test is positive for alcohol or drugs, the employee's Department shall hold a disciplinary hearing to gather all available facts. [¶] After the hearing, the District shall proceed with normal disciplinary procedures." Because the testing conducted by Transit is not voluntary, and indeed the results may be used in disciplining an employee, disclosure to Haynes will not inhibit Transit's ability to conduct further tests on other employees.[2]

Since Haynes has demonstrated good cause for disclosure of the results of the postaccident test, the trial court abused its discretion in quashing her subpoena in its entirety.

The peremptory writ of mandate is granted; the trial court is ordered to vacate its order quashing Haynes's

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[2] We recognize that Transit's director reached the opposite conclusion in his declaration. However, in light of the involuntary nature of the program which is set forth in the written policy attached to the director's declaration, the conclusion he reaches is not credible. Hence the director's declaration will not support the trial court's order. (See *Kroopf* v. *Guffey* (1986) 183 Cal.App.3d 1351, 1359-1360.)

subpoena and enter a new order denying Transit's motion to quash that portion of the subpoena which seeks the results of drug tests which were administered to Adams on July 7, 1986, and quashing the subpoena in all other respects.

/s/ Benke
BENKE, J.

WE CONCUR:

/s/ Work
WORK, Acting P.J.

Todd
TODD, J.

APPENDIX D

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 1, No. D006831 S005142

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

HAYNES *et al.*,
Petitioners,

v.

SUPERIOR COURT OF THE COUNTY OF SAN DIEGO,
Respondent;

NORTHERN SAN DIEGO COUNTY TRANSIT
DEVELOPMENT BOARD *et al.*,
Real Parties in Interest.

[Filed May 19, 1988]

Petitioners' petition for review DENIED.

/s/ Lucas
Chief Justice

APPENDIX E

COURT OF APPEAL—STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division One

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA 92101

RE: HAYNES, MARY LOU

v.

SUPERIOR COURT, COUNTY OF SAN DIEGO
NORTH SAN DIEGO COUNTY TRANSIT DEVEL.
D006831
San Diego County No. N35897

REMITTITUR

I, Stephen M. Kelly, Acting Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on February 24, 1988, and that this opinion or decision has now become final.

☐ Appellant —— Respondent to recover costs.

☐ Each party to bear own costs.

☒ Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this June 6, 1988.

STEPHEN M. KELLY
Acting Clerk

By: /s/ [Illegible]
Deputy Clerk

cc: All Counsel (Copy of remittitur only, California Rules of Court, —rule 25(e)).

APPENDIX F

ADMINISTRATIVE POLICY AND PROCEDURES
POLICY NO. 20

Issued: February 28, 1986

I. *SUBJECT*:

Alcohol and Drug Policy.

II. *PURPOSE*:

This policy outlines District alcohol and drug standards and general responsibilities of District managers and employees.

III. *POLICY*:

A. It is the policy of the North San Diego County Transit District to operate and maintain its transportation system in a safe and efficient manner for its passengers and to provide a safe work environment for its employees. A zero tolerance of alcohol and drugs is the prescribed norm for employees of NCTD.

B. All employees must report to work and perform their duties without being under the influence of drugs or alcohol, or having their ability to work impaired as a result of using drugs or alcohol on or off duty.

C. An employee may be disciplined up to and including discharge if an alcohol or drug test/screen performed when she/he is on duty or subject to duty is positive (indicating usage) for a drug or for alcohol *even if the employee has a prescription* should that prescription effect job performance. Positive for alcohol

would be limits that are legal limits as defined by the State of California in the vehicle code.

D. Employees are not to have drugs or alcohol in their possession including on their persons while on duty. The District has the right to search persons, personal property, lockers and vehicles located on District property when the District believes that this policy has been violated.

E. Employees are not to report to work with the smell or odor of alcohol on their breath. Employees who do so are presumed to be under the influence and subject to an alcohol test/screen. Should that test/screen prove positive, but less than the legal limit as defined by DMV, the employee will be disciplined for violation of this policy. Should that test/screen prove positive and be at or above the legal limit as defined by DMV, the employee will be subject to the appropriate discipline.

F. Refusal to submit immediately to a chemical test or search or to answer questions when requested by District or law enforcement personnel shall be grounds for insubordination and gross negligence and conduct unbecoming an employee, and will lead to termination.

IV. *PROCEDURE*

Each Department Manager is responsible for informing Department Employees of the District's Alcohol and Drug Policy and for enforcing the Policy.

V. *APPLICATION*

This policy applies to *all* District employees and is effective immediately and will be strictly enforced one month after the issue date.

VI. *EMPLOYEE RESPONSIBILITY*

An employee must:

A. Not report to work or be subject to duty while his or her ability to perform his/her duties is impaired due to drugs or alcohol use, or while his/her ability to work is impaired as a result of using drugs or alcohol on or off duty;

B. Not use alcohol or drugs which impair work performance just before or during working hours, on breaks or during lunch periods;

C. Provide immediately a current valid prescription of any drug identified when a drug screening is positive. The prescription must be in the employee's name;

D. Submit immediately to a chemical test and/or search when requested and answer questions; and

E. Notify the employee's Supervisor/Dispatcher when taking medications which may interfere with the safe and effective performance of duties or operation of District equipment. It is the employee's responsibility to provide the District with a written statement from the treating physician noting the effects the medication has on the performance of job duties. The District reserves the right to verify that statement with an appropriate medical specialist, Physician Drug Reference charts, or other relevant authorities.

VII. *MANAGEMENT RESPONSIBILITIES AND GUIDELINES*

A. Supervisors shall send an employee for an alcohol and drug analysis if the supervisor has reasonable cause to suspect a violation of the District Drug & Alcohol Policy.

B. If a chemical test is positive for alcohol or drugs, the employee's Department shall hold a disciplinary hearing to gather all available facts.

C. After the hearing, the District shall proceed with normal disciplinary procedures.

VIII. *DEFINITIONS*

Under the Influence—includes odor on the breadth, abnormal physical appearance or action caused by the use of alcohol, drugs or medication.

Subject to Duty—(1) Any employee who is scheduled to report for work at an assigned time and who has not been finally and completely released from the responsibility of performing further work that day is "subject to duty." (2) Any employee who is responsible for being available to perform work on an emergency basis when called to do so, i.e.: in an "on call" status, is "subject to duty," if said employee is guaranteed extra compensation because of his/her status as being "on call." (3) An employee who is "on call," i.e., simply responsible for responding, if available, when said employee is not within either the section (1) or (2) above, is not considered to be "subject to duty" for the purposes of this policy.

Alcohol and Drug Analysis—urine and blood specimens that are chemically tested (screened) for the purpose of detecting substances that include, but are not limited to alcohol, marijuana, cocaine, methadone, L.S.D., heroin, and phencyclidine (PCP), and any other designer substances that produce the same effects as controlled or illegal substances.

/s/ Richard L. Fifer
RICHARD L. FIFER
Executive Director

APPENDIX G

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

Case No. N 35897

MARY LOU HAYNES and LORI C. HAYNES,
Plaintiffs,

vs.

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD dba NORTH COUNTY TRANSIT DISTRICT, THE STATE OF CALIFORNIA, VONSHEILLIA ADAMS, and DOES 1 through 20, inclusive, *Defendants.*

NOTICE OF MOTION AND MOTION TO QUASH SUBPENA DUCES TECUM
[CCP § 1987.1]

Date: April 8, 1987

Time: 2:00 P.M.

Dept: F

TO: PLAINTIFFS MARY LOU HAYNES and LORI C. HAYNES, AND TO JOHN W. TOWER, THEIR ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that on April 8, 1987, at 2:00 P.M., or as soon thereafter as the matter may be heard in Department F of this Court located at 325

South Melrose Drive, Vista, California, NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD (hereinafter "NCTD") will, and hereby does, move for an Order to Quash Plaintiffs' Subpena Duces Tecum pursuant to the California Code of Civil Procedure § 1985.3 (f) and § 1987.1.

The Motion to Quash is and will be made on the grounds that the information requested is protected from discovery by the Physician—Patient Privilege, that disclosure of such information would violate the rights of privacy and confidentiality of both employee and employer, and would in addition cause irreparable harm to the effectiveness of NCTD's Drug and Alcohol Abuse Program.

Plaintiffs filed a Notice to Consumer and Affidavit for Subpena Duces Tecum on March 6, 1987 for production of the following:

> "All medical records for VONSHEILLIA ADAMS for the period from January 1, 1986 to the present, including but not limited to, any blood or urine tests conducted on or about July 7, 1986."

Plaintiffs are not entitled to discovery of such materials because they were acquired as confidential communication during treatment and are thus protected by the Physician—Patient Privilege. In addition, to disclose such information would be a serious breach of the confidentiality held between NCTD and its employees, on which NCTD's drug program depends, and a serious violation of the privacy rights of NCTD and its employees.

The Motion will be based on this Notice of Motion, on the Declaration of Tracy R. Richmond, and the Memorandum of Points and Authorities served and filed herewith, on the papers and records on file herein, and on

such oral and documentary evidence as may be presented on the hearing of the Motion.

DATED: 3/19/87

LAW OFFICES OF D. DWIGHT WORDEN
A Professional Corporation

By: /s/ Tracy R. Richmond
TRACY R. RICHMOND,
Attorney for Defendant
NCTD

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN DIEGO
NORTH COUNTY BRANCH

Case No. N35897

MARY LOU HAYNES and LORI C. HAYNES,
Plaintiffs,

vs.

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD dba NORTH COUNTY TRANSIT DISTRICT, THE STATE OF CALIFORNIA, VONSHEILLIA ADAMS, and DOES 1 through 20, inclusive,
Defendants.

Date: April 8, 1987

Time: 2:00 P.M.

Dept: F

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO QUASH

* * * *

The disclosure of an employee's medical records concerning its employee under these circumstances is an unreasonable and oppressive demand. The overriding constitutional considerations of privacy and confidentiality require that the request be denied.

* * * *

APPENDIX H

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

No. D 006831

MARY LOU HAYNES and LORI C. HAYNES,
Petitioners,

vs.

SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, NORTH COUNTY JUDICIAL DISTRICT,
Respondent,

vs.

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD dba NORTH COUNTY TRANSIT DISTRICT, THE STATE OF CALIFORNIA, VONSHEILLIA ADAMS, and DOES 1 through 20, inclusive,
Real Parties In Interest.

RESPONSE OF NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD AND VONSHEILLIA ADAMS TO PETITION FOR WRIT OF MANDATE

* * * *

The Trial Court carefully weighed the competing interests involved but could not justify the potential destruction of a program designed to promote and secure the health and safety of the general public. Transcript, Page 3, Lines 1-10. If discovery in this instance is per-

mitted, NCTD's promise of confidentiality will be known to its employees as a hollow one. Without voluntary compliance, the program cannot survive, and NCTD will be denied an opportunity to create a drug-free environment for its employees. The ultimate loser will be the public who will be deprived of the opportunity to secure safe and dependable mass transportation.

There is also an interesting side issue related to the spectre of compelling the disclosure of these voluntary test results. If test results can be compelled then there is a possibility that in future cases results may be used against employees in criminal proceedings thereby eliminating the need for probable cause to obtain them. As a public agency, there is a question of whether or not NCTD would then be required to Mirandize its employees before requesting voluntary alcohol or drug tests. The requirement for such admonitions would severely jeopardize the viability of this program, not only for NCTD, but for all other public agencies attempting to eradicate alcohol and drugs from the workplace.

The Trial Court keenly perceived and appreciated that NCTD's program and, for that matter, all voluntary drug programs are grounded and made possible by the promise of privacy and confidentiality. The Trial Court balanced the competing interests put forward by all parties and correctly concluded that the rights of privacy and confidentiality necessary for this voluntary drug program outweighed the Plaintiffs' right to discovery under the facts of this case.

• • • •

APPENDIX I

SUPREME COURT OF THE
STATE OF CALIFORNIA

Case No. D 006831

MARY LOU HAYNES and LORI C. HAYNES,
Petitioners,

vs.

SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF SAN DIEGO, NORTH COUNTY JUDICIAL DISTRICT,
Respondent,

NORTH SAN DIEGO COUNTY TRANSIT DEVELOPMENT BOARD dba NORTH COUNTY TRANSIT DISTRICT, THE STATE OF CALIFORNIA, VONSHILLIA ADAMS, and DOES 1 through 20, inclusive,
Real Parties In Interest.

[Filed April 4, 1988]

PETITION FOR REVIEW OF THE DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE

* * * *

INTRODUCTORY STATEMENT

Review by this Court is necessary to resolve important questions of law regarding the right of a public transit district to implement an effective drug control program

by preserving the confidentiality of test results. The law on drug testing in the work place is rapidly developing, focused primarily on whether random testing is legal, and if not, under what circumstances an employer may test an employee. *See*, e.g., *Railway Labor Executives, et al. v. Burnley, et al.* (1988) U.S. Ninth Circuit Court of Appeals, 88 Daily Journal D.A.R. 1766.

The issues raised in this proceeding are different, are of great importance, and are of first impression: where a drug test is conceded to be properly taken, do the employer and/or the tested employee have a right to preserve the confidentiality of the results, particularly where compelled disclosure will undermine an existing drug control program?

* * * *

III

WHILE A PRIVATE LITIGANT HAS A RIGHT TO DISCOVERY, THAT RIGHT MUST GIVE WAY TO MORE IMPORTANT PUBLIC POLICY CONSIDERATIONS.

The Court of Appeal correctly points out in its Opinion (Page 3) that private litigants have a right to discovery to enable them to ascertain the truth. The Court of Appeal Opinion also correctly acknowledges that, in cases such as this one, a balance must be achieved weighing the rights of a private civil litigant against those factors militating against disclosure.

In this case, there is no evidence in the record that ADAMS was under the influence at the time of the accident. ADAMS was not ticketed as a result of the accident, was not charged with any vehicle or other violation, and none of the witnesses or the police at the scene indicated that she appeared to be under the influence. There is simply no evidence of drug use, only the fact that NCTD had a policy of testing following fatal accidents.

This would be a tragic, but ordinary, accident but for the fact that NCTD *for its own internal purposes*, had an effective drug control program which called for a test. NCTD's drug control program which serves the safety needs of millions of riders and NCTD's own employees should not be jeopardized simply so that a civil litigant can fish for potential drug information unsupported by probable cause, particularly where, as here, the civil case can be adequately presented without access to the test results.

The HAYNESES can fully and fairly litigate their civil case against NCTD and ADAMS without the drug test results. The speed of the bus, the color of the traffic light, the circumstances under which the HAYNESES entered the roadway as pedestrians, etc., can all be fully discovered on a pre-trial basis and can be fully addressed at trial without the drug test results.

* * * *